

Opinion No. 99 CAO 5

Mr. David R. Smith
County Administrative Officer
County Administration Building
301 West Jefferson, 10th Floor
Phoenix, Arizona 85003

March 4, 1999

SYLLABUS:

Maricopa County is legally bound to use the new jail excise tax proceeds exclusively for the program authorized by A.R.S. § 42-6109 and as more fully described by the Citizens Advisory Committee Final Report, as modified by the jail program consultant (RNL Design) reconciliation set forth in its September 21, 1998 letter. The county must continue to spend, using revenues other than the new excise tax, an amount equal to county expenditures for jail maintenance and operation in fiscal year 1997-98, as verified by the Auditor General and as annually adjusted ("maintenance of effort" funds). The maintenance of effort funds must be placed into a segregated account such as the new Jail Tax Fund, in equal monthly installments, commencing with fiscal year 1999-00.

Dear Mr. Smith:

You have requested an opinion in regard to three issues:

1. What are the authorized uses for the proceeds of the tax authorized by Proposition 400?
2. What is the common sense interpretation of the "maintenance of effort" requirement contained in Arizona Revised Statutes § 42-1491?¹
3. What other legal issues exist as the Criminal Justice Facilities program moves toward implementation?

The events relative to the interpretation of Proposition 400 are as follows:

¹A.R.S. § 42-1491 was renumbered as A.R.S. § 42-6109 as of December 31, 1998. A copy of that statute is attached to this opinion.

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 2

1. Pursuant to authorizing legislation, the Board of Supervisors on June 29, 1998, passed a "Jail Facilities Excise Tax" resolution. It called for an election to approve an excise tax to be levied for a term not to exceed 9 years.² Miscellaneous materials were incorporated by reference, including the Final Report of the Citizens Advisory Committee on Jail Planning (dated November 18, 1997), as well as the Final Report by RNL Design, (the "Master Plan") which addressed the needs of the criminal justice detention system with final cost modifications reflecting the Citizens Advisory Committee (the "CAC") recommendations (dated November 12, 1997).³

² The authorized expenditures of the excise tax are: (1) finance construction of new adult and juvenile jail facilities; (2) maintain and operate adult and juvenile jail facilities; (3) fund the following for the purpose of reducing the expense of adult and juvenile jail facilities; (a) implementing an integrated criminal justice information system; (b) developing regional centers for courts not of record; (c) implementing differentiated case management for criminal cases in superior court; (d) consolidating criminal divisions of the superior court in the county to a common location; (e) expanding pretrial release supervision; (f) implementing electronic monitoring of preadjudicated defendants; (g) enhancing substance abuse evaluation and programming; (h) increasing drug court admissions to include preadjudicated defendants and expanding drug court jurisdiction; (i) using community based juvenile detention and post adjudication programs.

³ The nine member Citizens Advisory Committee on Jail Planning held fifteen public meetings at various locations in the county from March 21, 1997 through November 13, 1997. Committee

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 3

2. On July 24, 1998, the Board of Supervisors passed its resolution entitled "A resolution of the Board of Supervisors of Maricopa County related to jail facilities and programs; proposing a capital projects accumulation fund and an adjustment to the 1979-80 base expenditure limitation for jail facilities and programs; directing that the questions be submitted to the voters of the county for approval at the 1998 general election," and calling for a ballot proposal to authorize a capital projects accumulation fund and adjustments to base expenditure limitations.

members participated in the selection of a consultant team led by RNL Design, a nationally recognized justice systems consultant. After receiving the consultant's report, the committee held four additional public hearings and then presented to the Board of Supervisors the Final Report of the Citizens Advisory Committee on Jail Planning. On December 17, 1997 the Board of Supervisors acted to "[s]eek legislative authority to implement the recommendations of the Citizens Advisory Committee on Jail Planning..."

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 4

3. In response to the county's request for the necessary legislative authority, A.R.S. § 42-6109 was enacted, effective August 21, 1998. It authorized the ballot proposition allowing Maricopa County to place before the electorate a measure approving a jail facilities excise tax levy to construct and operate jail facilities, and specifying the purposes for which tax revenues can be spent.⁴

4. On August 24, 1998, the Board of Supervisors passed a resolution placing Propositions 400 and 401 on the ballot.⁵ This resolution incorporated the July 24, 1998 resolution.

5. On November 3, 1998, Propositions 400 and 401 passed. A publicity pamphlet containing the full text of the August 24, 1998 board resolution and referencing the recommendations of the CAC and the jail consultant's recommendations (the CAC Final Report and Final Report of RNL Design) was prepared and distributed to the electorate in advance of the vote.

6. A comparative analysis of the Master Plan and Senate Bill 1426 (now codified as A.R.S. § 42-6109) was submitted by RNL Design, Inc. to County Administrative Officer David R. Smith on September 21, 1998. This report reconciled the Master Plan and the \$900 million taxing limitation of the statute by recommending that phases I and II of the three-phase plan be implemented by the county.

DISCUSSION:

⁴The description of authorized expenditures is identical to that of A.R.S. § 42-6109 as set forth above in Footnote 2.

⁵Proposition 400 sought voter approval of a "temporary sales tax of 1/5 cent" to be used for the jail program. Proposition 401 sought voter approval to adjust the county's expenditure base by \$15.6 million, as required under the Arizona Constitution in order to allow the county to spend the tax money which would be authorized by Proposition 400.

Authorized Uses of Proposition 400 Proceeds

A.R.S. § 42-6109 sets forth a list of projects for which the proceeds of the jail facilities excise tax may be expended. While the description of those projects is in many instances quite broad, the statute establishes limits beyond which the county may not venture in budgeting and spending the proceeds of Proposition 400.

Senate Bill 1426⁶ also provided that along with the ballot issue authorizing the jail facilities tax, the Board of Supervisors must prepare and distribute a publicity pamphlet concerning the measure which must contain:

1. A true copy of the title and text of the resolution levying the tax;
2. The purposes for which the tax monies may be spent and the limitations on the amounts to be spent; and
3. The duration of the tax and estimate of the annual revenue. Laws 1998 (Second Regular Session) Ch. 225, § 5.

A.R.S. § 42-6109 establishes legal limitations on the authorized tax revenue expenditures. The statute establishes three general categories of authorized uses of the tax revenue:

- (1) construction of new jail facilities;
- (2) maintenance and operation of jail facilities; and
- (3) funding to increase the efficiency of various components of the criminal justice system in order to reduce the expense of adult and juvenile jail facilities.

While these expenditure limitations are quite broad, they should be construed in conjunction with the ballot materials circulated in support of Proposition 400. The Maricopa County Board of Supervisors, acting pursuant to Laws 1998 (Second Regular Session) Ch. 225, § 5 (Senate Bill 1426), caused to be prepared and distributed publicity pamphlets

⁶ Senate Bill 1426 was later codified as A.R.S. § 42-1491, now A.R.S. § 42-6109. Section 5 of Senate Bill 1426 was not included in either statutory provision, but remains as part of the Session Laws (Laws 1998 (Second Regular Session) Ch. 225, § 5).

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 6

concerning the jail tax ballot measure. These materials may be relied upon in construing the ballot measure. *Ruiz v. Hill*, 191 Ariz. 441, 957 P.2d 984 (1998) ("Arguments for" portion of publicity pamphlet filed in favor of 'English Only' amendment to Constitution stated that the proposed amendment was broadly applicable, contravening Attorney General's proffered narrow construction); *Bussanich v. Douglas*, 152 Ariz. 447, 733 P.2d 644 (Ariz. App. 1986) ("Arguments for" portion of publicity pamphlet applicable to construction of constitutional amendment).

Among the materials included in the publicity pamphlet distributed concerning Proposition 400 is the title and text of the August 24, 1998 board resolution which, upon voter approval, levied the authorized tax. The resolution states the purposes for which the tax monies may be spent and limitations on the amounts to be spent. The July 24, 1998 resolution was incorporated into the August 24, 1998 resolution.

The text of the board resolution does not expand the defined permissible uses of the tax revenue. Instead, the resolution text is identical to the language of the authorizing statute. However, the July 24, 1998 resolution specifically incorporates by reference a variety of materials that had been developed in anticipation of A.R.S. § 42-6109. These materials include RNL Design's "Final Report, Maricopa County Criminal Justice System Planning" (the Master Plan) and Final Cost Modifications to Reflect Citizen's Advisory Committee Recommendations. Additionally, the publicity pamphlet referred to the recommendations of the CAC and the jail consultant (the CAC Final Report and Final Report of RNL Design) in describing the program to be funded by Proposition 400. These materials provide further refinement to the broadly stated use restrictions of the authorizing statute as well as the text of the board resolutions. Together, these materials identified in the publicity pamphlet and the resolutions set forth the restrictions upon the county in determining how to spend the proceeds of the jail tax.

The Citizens Advisory Committee Final Report was identified by the Board of Supervisors (via Agenda Number C-20-98-027-9) as the basis for approaching the [state](#) legislature for authorization to place the program before the electorate. The legislature responded with the passage of A.R.S. § 42-6109 which authorized ballot Proposition 400, and which also limited the proposed program to nine years and a maximum of \$900 million in revenue. New jail facilities that were proposed by the CAC are the cornerstone of the county's criminal justice system improvements, as are specific maintenance and operational items. These recommendations were made only after an eight month study of the entire system, and after projects designed to improve the efficiency of the system (and to reduce demand upon the facilities and operational components of the system) were considered and recommended for approval. Inasmuch as these recommendations were incorporated into

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 7

the Board of Supervisor's resolutions and into the publicity pamphlet, they provide the most detailed source of the legally authorized uses of the jail tax revenues.

The CAC Final Report was prepared in anticipation of a fifteen year tax with anticipated revenues of approximately \$1.3 billion. A.R.S. § 42-6109, as enacted, truncated the anticipated revenue cap and duration to \$900 million and nine years, respectively. In response, the county's consultant, RNL Design, was commissioned to perform a comparative analysis of the county's fifteen year, three-phase Master Plan versus the program authorized by the legislature. RNL Design's reconciliation of the two concluded that the financial limitations of the legislative authorization restrict implementation of the Master Plan to phases I and II. This reconciliation leads to the conclusion that the Proposition 400 ballot requires the county to provide phases I and II of the Master Plan, as modified and recommended to the Board of Supervisors by the Citizens Advisory Committee.

The Master Plan and the budgetary recommendations as set forth in the Final Cost Modifications are, of necessity, estimated costs to provide the facilities and services described therein. As such, the county is not legally obligated to expend precisely the amounts stated. However, the county is obligated to the fullest extent possible to produce each of the individual projects and programs described. The estimated budgetary amount for each item may be amended, and projects/programs may be altered, but only to the extent such changes promote the overall intent of the legislation and the commitment to the electorate to provide the full criminal justice program.

While it is impossible (and beyond the scope of this opinion) to identify and discuss all factors which might justify variance from the consultant's Master Plan as approved by the Citizens Advisory Committee, it is the opinion of this office that:

1. The adult and juvenile jail facilities are the cornerstone of the program and must be provided essentially as described;
2. Only factors that are consistent with the three objectives expressed in A.R.S. § 42-6109⁷ may justify variation from the Master Plan/ Citizens Advisory Committee Report;

⁷ The three expressed objectives of A.R.S. § 42-6109 are: (1) construction of additional juvenile jail facilities; (2) maintenance and operation of jail facilities; and (3) funding of nine specified programs and facilities (which will reduce the demand for jail facilities and their costs of operation.) (See Footnote 2 for complete text.)

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 8

3. Although any proposed variation must be considered on its merits, such factors as impossibility of performance or obsolescence of the concept (for example, because of a change in the law or a demonstrated ineffectiveness of a specified project or program) might justify a modification to the program;

4. The greater the variation contemplated, the more compelling the justification should be for the modification; and

5. The justification must be in harmony with the express purposes of A.R.S. § 42-6109 by promoting either:

- (a) the construction of jail facilities;
- (b) maintenance and operation of jail facilities; or
- (c) improving the efficiency of and/or reducing the need for jail facilities via one or more of the nine authorized expenditures listed in A.R.S. § 42-6109(C)(3).

The "Maintenance of Effort" Requirement:

Often included in legislation granting additional taxing authority is a requirement that the taxing entity continue to spend, from sources other than the new tax proceeds, the amount deemed necessary by the entity in the previous year to provide the services and facilities that are the subject of the additional taxing authority. Colloquially known as a "maintenance of effort" provision, the requirement is contained in A.R.S. § 42-6109 and is intended to preclude the county from treating the revenue from the new taxing authority as a means to fund its current adult and juvenile jail facilities and programs, and consequently reducing the amount of county funding from traditional county sources for operating and maintaining these programs and facilities.

The "maintenance of effort" requirement associated with the imposition of the jail excise tax is found in A.R.S. § 42-6109(D). Subsection D requires the county to "maintain its support of adult and juvenile jail facilities," and sets forth the means to comply with that requirement.

The County must determine the amount it spent for "maintenance and operation"⁸

⁸ "Maintenance and operation" is defined in Subsection D as including "detention personnel compensation, employee related expenses, utility expenses of the facility, costs of food and care of

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 9

of adult and juvenile jail facilities in the fiscal year preceding the first fiscal year in which the jail excise tax was levied (i.e., Maricopa County's fiscal year 1997-98, ending June 30, 1998, because the tax was levied in fiscal year, 1998-1999). Any outstanding debt owed to the county by a city, the state or the federal government for housing prisoners pursuant to A.R.S. § 31-121 (establishing sheriff's authority to receive and provide for "city or town" prisoners and for the county to be paid for the costs of incarceration) is excluded from this "base expenditure" calculation. The auditor general will audit the county's calculation and the audited amount is the "base expenditure" upon which the "maintenance of effort" requirement is determined.

The formula for determining the "maintenance of effort" funding for the first year is as follows:

In the first year the tax is levied under this section the county shall pay an amount equal to the base expenditure adjusted by the percentage change in the assessed valuation of the taxable property in the county, determined for secondary property tax purposes, from the preceding year.

A.R.S. § 42-6109(D). Thus, in the current fiscal year (1998-1999), the county must pay that amount from the general fund for purposes set forth in A.R.S. § 42-6109(C).

In each year *after* the first year, the "maintenance of effort" requirement is calculated as follows:

prisoners, administrative support costs and costs of maintaining and repairing the facility and grounds."

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 10

[T]he county shall pay an amount equal to the amount paid under this subsection in the preceding fiscal year, adjusted by the percentage change in the assessed valuation of the taxable property in the county, determined for secondary property tax purposes, from the preceding year. The county treasurer shall transfer that amount in twelve equal monthly installments from the county general fund for the uses prescribed in Subsection D⁹ of this section.

In our opinion, the mechanism of funding the "maintenance of effort" obligation in twelve monthly transfer amounts applies to each year *subsequent* to the first year in which the tax is levied. We reach this conclusion because this one-twelfth monthly payment mechanism refers back to the immediately preceding sentence. This is evident by the reference to "that amount" to be paid from the county general fund in twelve equal monthly payments which is determined by the formula stated in the preceding sentence. The context and language of the preceding sentence make it apparent that the sentence applies to each year after the first year, because the "maintenance of effort" funding calculation is based upon "the amount equal to the amount paid under this subsection in the preceding fiscal year." As there is no amount "paid under this subsection for the preceding fiscal year" for the first year in which the tax is levied, and because the immediately preceding sentence explicitly addresses the first year requirement, we conclude that this sentence and the sentence following it requiring the treasurer to transfer "that amount" in twelve equal installments do not apply to the first year of the new tax. This different treatment of the first year from subsequent years is logical and likely arises at least in part from the impracticality of requiring a shift to a one-twelfth monthly payment structure halfway through the ongoing fiscal year in which many maintenance and operation expenses have already been paid, and not necessarily on a one-twelfth monthly basis.

In summary, although the one-twelfth monthly transfer mechanism does not apply to the first year of the tax levy, the "maintenance of effort" amount as calculated pursuant to statute must be spent or allocated to the segregated jail fund during fiscal year 1998-1999 for purposes designated in A.R.S. § 42-6109(C). For fiscal years after the first one in which the tax is levied, the one-twelfth monthly installments should be transferred from the county general fund into the designated jail fund from which appropriate Subsection C

⁹ So in original, should read "Subsection C."

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 11

expenses are paid as they arise.

In implementing the county's several obligations under the statute and Proposition 400 as interpreted above, the Board of Supervisors has discretion in resolving funding and program issues as they may arise, consistent with the goal of providing an efficient, effective criminal justice program. The jail facilities program is, by definition, a dynamic endeavor and not merely static infrastructure. The success of the endeavor and the avoidance of legal challenge will depend in large measure on diligent oversight of program expenditures.

No other legal issues have been identified at this time.

Very truly yours,

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY
DIVISION OF COUNTY COUNSEL

John W. Paulsen
Deputy County Attorney

Paul E. Golab
Deputy County Attorney

Mr. David R. Smith
County Administrative Officer
March 4, 1999
Page 12

Approved by the Opinion Review
Committee of the Maricopa County
Attorney's Office the 4th day of
March 1999.

REQUEST NO. 98CA014
S:\COUNSEL\CIVIL\PAULSEN\OPINIONS\REDOPI.WPD